Petition

81-168

No.

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In the Supreme Court of the United States

October Term, 1981

FORREST D. LIVINGSTON,
Petitioner,

vs.

CONTINENTAL AIRLINES, et al.,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN SUSTAINING THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THE ELECTION OF REMEDIES ISSUE HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT IS NOVEL AND WILL HAVE A SUBSTANTIAL IMPACT ON ERISA AND COMMON LAW ACTIONS INVOLVING PENSION RIGHTS.

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No.

In the Supreme Court of the United States

October Term, 1981

FORREST D. LIVINGSTON,
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vs.

CONTINENTAL AIRLINES, et al.,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Forrest D. Livingston, prays that a Writ of Certiorari issue to review the memorandum and judgment of the United States Court of Appeals for the Ninth Circuit entered on April 24, 1981.

OPINIONS BELOW

The Opinion and Memorandum of the United States Court of Appeals for the Ninth Circuit appears as Appendix "A" and is not reported.

The Memorandum to Counsel, Findings of Fact and Conclusions of Law, and Judgment of the United States District Court for the Central District of California are not reported and appear as Appendix "B". No other written opinion other than the Memorandum to Counsel, Findings of Fact and Conclusions of Law and Judgment were entered by the trial court.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was handed down and entered on April 24, 1981. A petition for rehearing was not deemed practical, and therefore one was not filed. This Petition for Certiorari is being filed within ninety days of the entry of judgment. Accordingly, jurisdiction of this Court is involved pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This action involves construction of the Fifth and Fourteenth Amendments of the Constitution of the United States as well as 29 U.S.C. Section 1132(a)(1)(B).

STATEMENT OF THE CASE

This action was filed on March 20, 1978, in the United States District Court for the Central District of California. Jurisdiction was based on diversity of citizenship and amount as provided in 28 U.S.C. Section 1332(a)(1).

Parties

Petitioner herein (Plaintiff and Appellant below) is Forrest D. Livingston. Respondents herein (Defendants and Appellees below) are Continental Airlines, Robert F. Six, Charles A. Bucks, and Jess Schmidt. For reasons of clarity, the parties will be referred to hereafter as "Livingston" and "Continental" respectively.

Nature of Case

The basic issue involved is whether or not Livingston's request for and later acceptance of his contributions to

Continental's pension plan was an election of remedies that barred an action for breach of contract (Continental's termination of severance pay that would have allowed Livingston to vest) although the expressed provision of Continental's pension plan provided for the automatic return of Livingston's contributions. Livingston maintains that Continental deprived him of pension property without due process of law in violation of the Fifth and Fourteenth Amendments and that the adverse holding of the Court of Appeals for the Ninth Circuit prohibited his filing of a common law contract action or an action based upon 29 U.S.C. Section 1132(a)(1)(B) to recover future benefits due him.

Disposition by Trial Court

On August 17, 1978, the Trial Court granted Continental's Motion for Summary Judgment. A timely notice of appeal was filed by Livingston and the record was submitted on January 18, 1979.

Disposition by Appellate Court

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. Section 1291 and perfected in accordance with Rule 4 of the Federal Rules of Appellate Procedure. Briefs were filed, and following oral argument, the Court of Appeals on April 24, 1981, affirmed the judgment of the District Court.

STATEMENT OF FACTS

Livingston was an employee of Continental Airlines from June 20, 1960 until terminated effective December 15, 1973. From December 15, 1973, Livingston was to receive

20 weeks of severance pay until mid-May, 1974. If Livingston had received his full severance pay, his rights would have vested in Continental's retirement plan on May 1, 1974.

However, Continental terminated Livingston's severance pay effective March 20, 1974, due to Livingston's attorney writing a settlement letter to Continental advising potential litigation alleging the wrongful discharge of Livingston.

In effect, Continental's termination of Livingston's rightful and *non-gratuitous* severance pay totally precluded Livingston's vesting in Continental's retirement plan on May 1, 1974.

Continental's retirement plan in paragraph 9.3 provided that Livingston, who had never vested in the retirement plan due to Continental's termination of his severance pay, was deemed to have *automatically* given notice of withdrawal and should be paid the entire amount of his contributions. In effect, Livingston never had to request the refund of his contributions to Continental's retirement plan. Continental had an affirmative duty to pay back Livingston's contributions.

On June 17, 1974, Livingston requested in writing a refund of the contributions he made to Continental's retirement plan. Livingston received and accepted payment of $9,745.66 on June 25, 1974.

REASONS FOR GRANTING THE WRIT

I.

A Writ of Certiorari Should Issue Since the United States Court of Appeals for the Ninth Circuit Court in Sustaining the Trial Court's Order of Summary Judgment in Favor of Respondents on the Election of Remedies Issue Has Decided an Important Federal Question That Is Novel and Has a Substantial Impact on ERISA and Common Law Actions Involving Pension Rights.

The gist of Livingston's lawsuit is his contention that Continental's termination of his severance pay constituted a breach of contract. The damages suffered by Livingston was the loss of the remainder of his 20 weeks severance pay and the loss of future benefits in Continental's retirement plan that would have commenced upon the May 1, 1974 vesting date.

The Honorable William P. Gray, the United States District Judge who heard the case, in his Memorandum To Counsel (Appendix "B"), found that the 20 weeks of severance pay was not a "gratuity" that could be cancelled at the whim of Continental so as to prevent vesting by Livingston in the retirement plan.

However, Judge Gray reasoned that Livingston's requesting and later acceptance of his contributions to the retirement plan barred his lawsuit despite the expressed provision in Continental's plan that members who had not vested were to automatically receive the return of their contributions. Judge Gray concluded that Livingston's action was based upon the proposition that he had fulfilled the requirements for vesting.

Judge Gray's above-described conclusion does not fit the facts of the case. The Court of Appeals recognized in

its majority opinion that Continental's termination of Livingston's severance pay prevented his vesting in the retirement plan.

However, the majority opinion in the Court of Appeals never treated the fact that Livingston had no real choice to elect remedies in the first place!

The majority opinion totally ignored the fact that Continental had an affirmative expressed duty under its retirement plan to automatically return Livingston's contributions because he never vested in the plan. An election of remedies presupposes that Livingston had alternatives in the first place. Continental, by its own retirement plan, was bound to return Livingston's contributions without his request.

There is no doubt that this election of remedies question is novel. The United States District Court, the Court of Appeals, and counsel for both parties could not find a single case on point.

Substantial federal questions are involved in this election of remedies issue.

Although Livingston sought federal jurisdiction by means of diversity of citizenship, the same election of remedies question is applicable to an ERISA action brought under 29 U.S.C. Section 1132(a)(1)(B) in which a participant in a retirement plan may bring a civil action in Federal Court to clarify his rights to *future benefits* under the terms of the plan. The question is still the same: Would an employee's requesting and acceptance of his contributions to a retirement plan bar an action concerning future benefits when he was first prevented from vesting in the plan by the employer and secondly, the employer expressly provided that since the employee was non-vested that his contributions should be automatically returned to the employee?

Livingston maintains that the rationale of Judge Canby in his dissenting opinion should be adopted as the law in this case.

CONCLUSION

For the reason stated above, it is clear that the United States Court of Appeals for the Ninth Circuit has decided an important and novel federal question in a manner that ignores the fact that Livingston had no real choice in his requesting and accepting his contribution to support an election of remedies defense due to Continental's pre-existing duty to automatically return his contributions. Therefore, this Court is urged to exercise its supervisory powers and grant the Writ of Certiorari requested herein.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

(Filed April 24, 1981)

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
No. 78-3157

D.C. No. CV 78-1056 WPG

FORREST D. LIVINGSTON,
Plaintiff-Appellant,

v.

CONTINENTAL AIRLINES, et al.,
Defendants-Appellees.

MEMORANDUM

Submitted—October 10, 1980

Appeal from the United States District Court
for the Central District of California
Hon. William P. Gray, Presiding

Before: SCHROEDER and CANBY, Circuit Judges, and RAMIREZ,* District Judge

Appellant Livingston appeals from the grant of the defendants' motion for summary judgment. We affirm.

*Honorable Raul A. Ramirez, United States District Judge for the Eastern District of California, sitting by designation.

FACTS

Plaintiff Livingston worked for the defendant Continental Airlines[1] for approximately fourteen years, during most of which time he made contributions to the company retirement plan. In 1973 defendant made the decision to fire the plaintiff. At the time of the decision to fire, plaintiff was entitled to twenty weeks of severance pay. Since plaintiff's actual service time was insufficient to permit his pension to vest, defendant gratuitously delayed plaintiff's termination for approximately seven weeks so as to permit plaintiff to accumulate enough "in service time" and "severance time" so as to vest the pension. Plaintiff's termination was effective December 15, 1973.

In March 1974, while plaintiff was drawing severance pay, his attorney, with plaintiff's knowledge and approval, wrote a letter to the defendant threatening litigation for wrongful discharge. Defendant was offended by both the tone and the content of the letter and immediately terminated plaintiff's severance pay. The result of the early termination of severance pay was that plaintiff did not have sufficient time on the payroll to cause his pension to vest. In addition, plaintiff will not receive pension payments when he would otherwise be eligible by virtue of his age.

In June 1974, plaintiff requested and received a refund of $9,745.66, said sum representing the total contribution made by plaintiff to defendant's retirement fund.

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1. The other defendants were employees/officers of Continental Airlines. Two of the individual defendants joined in Continental's motion for summary judgment, and judgment was eventually entered in their favor. The record on appeal does not indicate the status of the third individual defendant.

DID THE TRIAL COURT ERR IN HOLDING THAT LIVINGSTON DID NOT HAVE AN AGENCY COUPLED WITH AN INTEREST

An "agency coupled with an interest", unlike the ordinary principal-agent relationship, is irrevocable by the principal. In the present case, plaintiff contends that the gratuitous actions of the defendant created an agency coupled with an interest, and thus Continental was without power to terminate plaintiff's severance pay.

The Restatement of Agency 2d, cited with approval in *Becket v. Welton Becket & Associates*, 39 Cal.App.3d 815, 114 Cal.Rptr. 531 (1974), defines an agency coupled with an interest as follows:

> A power given as security is a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration.

Since the principal creates the agency in order to assure the agent that he will receive some benefit owed him by the principal, there is no question that the benefit referred to is not the benefit of receiving compensation for services as an agent, *Becket v. Welton Becket & Associates, supra*, 1 Witkin, *Summary of California Law, Agency & Employment* (8th ed.), §227. As the court in Becket so aptly puts it: "Plaintiff's employment with [defendant company] was not provided to him *as a vehicle* for protecting any interest he had in the company." 39 Cal.App.3d at 820 (emphasis supplied).

Here, Continental did not make the plaintiff its agent in order to secure any interest of plaintiff's independent

of his interest in receiving compensation for services rendered. For this reason, the actions of the defendant did not create an agency coupled with an interest within the contemplation of the common law or California Civil Code §2356.

DID THE TRIAL COURT ERR IN HOLDING THAT LIVINGSTON'S TORT CLAIMS WERE BARRED BY THE ONE YEAR STATUTE OF LIMITATIONS

The termination of plaintiff's severance pay in retaliation for his letter threatening litigation took place on March 28, 1974. The plaintiff filed his lawsuit on August 12, 1975 in the United States District Court, for the Western District of Missouri. Obviously, more than one year lapsed between the act giving rise to plaintiff's lawsuit and the actual filing of the lawsuit. The trial court found that plaintiff's tort claims were therefore barred.

Plaintiff argues that since the right to receive a pension is an ongoing one, the wrong which he suffered was a continuing wrong, thereby tolling the applicable statute of limitations. The plaintiff has confused the act and its effect. In California, the law is clear that a claimant has a separate cause of action to establish "pensionable status" and unless such status is established within the applicable period of limitations, all pension rights, including installments falling due in the future, are barred. *Phillis v. City of Santa Barbara,* 264 Cal.App.2d 781, 70 Cal.Rptr. 573 (1968), *Driscoll v. City of Los Angeles,* 67 Cal.2d 297, 61 Cal.Rptr. 661 (1967), *Dillon v. Board of Pension Commissioners,* 18 Cal.2d 427, 116 Cal.Rptr. 37 (1941).

For the foregoing reasons, plaintiff's attempt to complain of the acts of the defendants by causes of action sounding in tort were barred by the applicable statute of limitations.

DID THE TRIAL COURT ERR IN HOLDING THAT LIVINGSTON'S REQUEST AND ACCEPTANCE OF HIS CONTRIBUTIONS TO THE RETIREMENT FUND CONSTITUTES AN ELECTION OF REMEDIES

The trial court did not err in finding that plaintiff's actions constituted an election of remedies if, in fact, the election is understood to refer to the prohibition on double recovery. California Civil Code §1692. In the present case, the obligation of Continental to pay pension benefits was a contractual one. When Continental terminated plaintiff's severance pay on March 20, 1974, it allegedly breached that contract and plaintiff had two options: he could treat the contract as a nullity and request restitution of his consideration, or he could treat the contract as enforceable and sue for the benefit of his bargain. In requesting the return of his contributions to the retirement fund, plaintiff requested the return of his consideration. By maintaining the present lawsuit, plaintiff seeks to have both the return of his consideration and the benefit of his bargain. He is not entitled to both. Having elected to accept the return of his consideration, plaintiff is foreclosed from pursuing the pension benefits.

Although Section 1692 provides for "consequential damages" in addition to restitution, under the present circumstances the pension benefits sought by plaintiff cannot be characterized as consequential damages, *cf., Runyan v. Pacific Air Industries, Inc.*, 2 Cal.3d 304, 85 Cal.Rptr. 138 (1970), *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (1978). The purpose of the consequential damages provision of Section 1692 is to make the nonrescinding party whole, particularly where the nonrescinding party is not at fault. Permitting a party to receive both the return of his consideration and the benefit of his bargain,

however, goes beyond making him whole—in fact, it would provide plaintiff with duplicate and inconsistent items of damages.[2]

The decision of the District Court is AFFIRMED.

CANBY, C.J., dissenting.

I respectfully dissent. The majority and I disagree on the substance of Livingston's contract claim. The majority states that Livingston claims that he is entitled to be included in Continental's pension plan. As a result, his decision to accept a refund of his contributions to the pension fund was a binding election of remedies. If that were his claim, I would agree.

A review of the pleadings, however, demonstrates that Livingston's claim should be characterized quite differently. In his complaint, Livingston asserted that Continental agreed to keep him on the payroll until May 1, 1974, when his pension rights would have vested. Livingston asserted that Continental breached this contract by firing him on March 20, 1974, before his pension rights did vest. He asked for damages for this breach. Those damages would necessarily be measured by the benefits he would have received under the pension plan, had his pension rights vested, minus the benefits he did receive by accepting a refund. No double recovery would be involved.

When Livingston's claim is characterized in this way, it is clear that the majority and the district court have erred by ruling that his accepting a refund was a binding election of remedies. Under California law, an election of remedies is binding only when the remedies are incon-

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2. Because of the disposition of the case on the issue of election of remedies, the Court takes no occasion to discuss whether there was in fact an accord and satisfaction.

sistent. *Glendale Federal Savings & Loan Association v. Barina View Heights Development, Inc.*, 66 Cal.App.3d 101, 135 Cal.Rptr. 802, 823 (1977). In this case, the two remedies available to Livingston were not inconsistent.

Livingston's right to receive a refund of his contributions to the pension fund arose from his original employment contract, as embodied in Continental's written company policies. Those policies stated that an employee who was terminated before his pension rights vested was automatically entitled to a refund of his contributions. By accepting a refund, Livingston was accepting exactly what he was entitled to receive under the terms of this contract. Livingston's right to damages, however, arose from the alleged breach of a completely separate contract—Continental's agreement in December 1973 to keep him on the payroll until his pension rights vested. When the two contracts are separated, it is clear that Livingston never accepted a return of the consideration for the latter contract.

Because the remedies available to Livingston are not inconsistent, he did not make a binding election of remedies by accepting a refund of his contributions to the pension fund. Therefore, the district court erred in dismissing his contract claim for failure to state a claim.

APPENDIX "B"

(Filed August 17, 1978)

UNITED STATES DISTRICT COURT
Central District of California

Civil No. 78-1056-WPG

FORREST D. LIVINGSTON,
Plaintiff,

v.

CONTINENTAL AIRLINES, et al.,
Defendants.

MEMORANDUM TO COUNSEL

Since the oral argument, on June 19, 1978, of the defendants' motion for summary judgment, the court has reconsidered the papers filed by the parties prior to that date. I also have received and considered the plaintiff's supplemental memorandum, filed on July 5, 1978, and the defendants' reply thereto, filed July 12, 1978.

The court is in substantial agreement with the position of the defendants, as set forth in their memorandum. For the information of counsel, I will summarize my views as follows:

(a) The one-year statute of limitations on the tort claims began to run on March 28, 1974. There was no "continuing wrong," as urged by the plaintiff.

(b) It appears that prior to the termination of the employment of the plaintiff, the company did establish a policy of granting twenty weeks of severance pay. This became one of the conditions of employment, and for the plaintiff to have continued in his employment there-

after, and up to December 15, 1973, could be considered to constitute consideration for the establishment for such policy. Thus, I would have difficulty in concluding that the twenty weeks of severance pay was a "gratuity" that could be cancelled at the whim of the defendants, or even as a result of the defendants being justifiably incensed upon receipt of the insulting letter from the plaintiff.

(c) However, the requesting and later acceptance by the plaintiff of the return of his contribution to the retirement plan does foreclose the present action. As the plaintiff points out, "automatic withdrawal on termination" applies to "any member who has not fulfilled the requirements of vesting." Here, the plaintiff's action is on the basis that he *has* fulfilled the requirements for vesting. He cannot have both vesting and return of retirement contributions. His acceptance of the latter is an accord and satisfaction.

(d) There was no agency coupled with an interest.

In light of the foregoing, I am contemporaneously signing and causing to be filed the Findings of Fact and Conclusions of Law and Judgment submitted on behalf of the defendants.

DATED: August 16, 1978.

/s/ William P. Gray
United States District Judge

UNITED STATES DISTRICT COURT
Central District of California

Civ. No. 78-1056-WPG

FORREST D. LIVINGSTON,
Plaintiff,

v.

CONTINENTAL AIRLINES, Et Al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE SUMMARY JUDGMENT

The defendants' motion for summary judgment came on for hearing before this Court on June 19th, 1978, pursuant to Notice of Motion, timely filed and served by defendants, and the Court having considered all papers filed in reference thereto by both parties, having heard argument by counsel for the parties and being fully advised in the premises, the Court finds that there is no genuine issue as to any material fact and hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Forrest D. Livingston is a citizen and resident of the State of Missouri.

2. Defendants are citizens and residents of states other than the State of Missouri.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

4. Defendant Continental Air Lines, Inc. at all times herein mentioned was a domestic passenger airlines authorized under law to pursue such business.

5. At all times herein mentioned, Robert F. Six was Chairman of the Board and chief executive officer of defendant Continental Air Lines, Inc. and Charles A. Bucks was Executive Vice President-Marketing of defendant Continental Air Lines, Inc.

6. Plaintiff Forrest D. Livingston was employed by defendant Continental Air Lines, Inc. on June 20, 1960. He applied for membership in the Retirement Income Plan of Continental Air Lines, Inc. on March 27, 1964.

7. Plaintiff Forrest D. Livingston was engaged in sales for defendant Continental Air Lines, Inc. until November 1, 1964, was manager of charter sales from November 1, 1964 to July 1, 1965, was manager of passenger sales, Dallas, Texas, from July 1, 1965 to August 1, 1969, and was Regional Manager, Kansas City, Missouri, from August 1, 1969 to December 15, 1973.

8. The salary of plaintiff Forrest D. Livingston on December 15, 1973, the date on which he ceased rendering service to defendant Continental Air Lines, Inc., was $1,955.00 per month.

9. Plaintiff Forrest D. Livingston was terminated as an employee of defendant Continental Air Lines, Inc. effective December 15, 1973; however, he was advised at the time of said termination notice in 1973 that he would receive post-employment payments in the amount of his salary until May 1, 1974.

10. Had plaintiff Forrest D. Livingston received post-employment payments to and including May 1, 1974, certain pension rights would have vested in plaintiff.

11. On or about March 18, 1974, plaintiff Forrest D. Livingston by his attorney, wrote defendant Robert F. Six an abrasive letter, threatening to sue Continental for damages over loss of employment.

12. Plaintiff Forrest D. Livingston read the letter after it was sent to defendant Robert F. Six and had no objection to the language or tone of the letter.

13. On or about March 20, 1974, defendant Continental Air Lines, Inc. terminated the post-employment payments to plaintiff Forrest D. Livingston.

14. By letter of March 28, 1974, defendant Charles A. Bucks advised plaintiff Forrest D. Livingston:

> "Since the letter from Mr. Schmidt confirming the termination of your active employment on December 15, 1973 but your continuation on the payroll until May 1, 1974 in order to allow you to vest, you have taken actions against the Company, including threats, through your attorney, of filing Court action, that are not in the best interests of the Company and which I believe warrant your immediate termination. As a result, you have been removed from payroll effective March 20, 1974. . . ."

15. Defendant Charles A. Bucks took the action terminating payments because he "no longer felt the moral obligation" to continue making post-employment payments to plaintiff. Plaintiff contends there was a legal obligation to make such payments.

16. On June 17, 1974, plaintiff requested in writing "a refund of the contributions I have made to the Continental Airlines Retirement Plan." Said request related to the alleged pension rights, which were financed by employee contributions.

17. Plaintiff Forrest D. Livingston received and accepted payment of $9,745.66 on June 25, 1974 representing the total contributions to his Retirement Income Plan and earnings thereon.

18. The instant lawsuit was filed March 20, 1978.

19. Any findings of fact stated hereinafter in Conclusions of Law are hereby incorporated as Findings of Fact.

CONCLUSIONS OF LAW

I

The Court has jurisdiction of this action based upon the diversity of state citizenship of plaintiff and the defendants, the amount in controversy exceeding $10,000. 28 U.S.C. § 1332.

II

Plaintiff was employed by Continental pursuant to an oral agreement and there was no agreed term of employment. Such employment agreement was therefore an "at will" employment.

III

Such employment was not an agency coupled with an interest and could therefore be terminated at the sole option of either party.

IV

Defendants' termination of plaintiff's employment was, under applicable law, defendants' legal right and inflicted no legal harm or damage upon plaintiff. Even if plaintiff's employment termination was solely due to his threatened litigation against Continental it was still Continental's unfettered legal right to terminate said employment immediately.

V

Plaintiff elected to request and receive a refund of contributions to the Continental Airlines Retirement Plan,

and is barred from seeking alleged damages for breach of alleged contract claims under said Retirement Plan, by reason of having entered into an accord, under California Civil Code Section 1521, or having made a binding election of remedies.

VI

The individual defendants as officers of Continental had a confidential relationship to Continental. The decision of said individual defendants or any of them to discharge plaintiff was not an illegal interference with plaintiff's contractual relations or an illegal inducement to terminate his contract of employment. As officers of Continental such decision by the individual defendants or any of them was the act of Continental itself and was legally privileged.

VII

Each and every count of the complaint or in tort is barred by the California statute of limitations, which is controlling, there being no federal applicable statute of limitations.

VIII

Any conclusions of law contained in the Findings of Fact hereinabove stated are incorporated herein as Conclusions of Law.

IT IS THEREFORE ORDERED that summary judgment of dismissal of complaint be made and entered in favor of defendants and against plaintiff.

DATED: Aug. 16, 1978.

The Hon. /s/ William P. Gray
Judge, United States District Court

UNITED STATES DISTRICT COURT
Central District of California

Civ. No. 78-1056-WPG

FORREST D. LIVINGSTON,
Plaintiff,

v.

CONTINENTAL AIRLINES, Et Al.,
Defendants.

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard on June 19, 1978 upon motion of defendants Continental Air Lines, Inc., Robert F. Six and Charles A. Bucks pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered all the papers on record herein including certified documents in an action between the same parties hereto in the United States District Court for the Western District of Missouri, No. 75 CV 23-SJ, and having heard and considered the arguments of counsel for all parties and being fully advised in the premises, it is the judgment of this Court that the defendants' Continental Air Lines, Inc., Robert F. Six and Charles A. Bucks' motion for summary judgment be and the same is hereby granted.

DATED: Aug. 16, 1978.

The Hon. /s/ William P. Gray
Judge, United States District Court

APPENDIX "C"

§ 1132. Civil enforcement

PERSONS EMPOWERED TO BRING CIVIL ACTION

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Opposition

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-168

In the Supreme Court of the United States

October Term, 1981

FORREST D. LIVINGSTON,
Petitioner,

vs.

CONTINENTAL AIRLINES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioner's Claims For Breach Of Contract Based Upon The Termination Of His Severance Payments Are Barred By His Election Of Remedies Or By The Doctrine Of Accord And Satisfaction Under California Law.

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No. 81-168

In the Supreme Court of the United States

October Term, 1981

FORREST D. LIVINGSTON,
Petitioner,

vs.

CONTINENTAL AIRLINES, et al.,
Respondents.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari that seeks review of the Ninth Circuit's unreported opinion in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This action does not involve the construction of any provisions of the Constitution of the United States, or of any federal statute, and no such questions were raised or presented to either court below.

1. Respondents herein, defendants and appellees below, are Continental Airlines, Inc. ("Continental"), and three individual employees of Continental: Robert F. Six, Charles A. Bucks, and Jess Schmidt. Continental is a parent corporation with no subsidiary corporations other than wholly owned subsidiaries beyond the scope of Supreme Court Rule 28.1.

STATEMENT OF THE CASE

Petitioner Livingston was employed by respondent Continental from June 20, 1960, until he was terminated in 1973. Livingston had no written contract of employment. Certain company personnel policies were in writing, including a "Retirement Income Plan," and an "Employee Grievance Procedure," as part of its "Corporate Policy Manual."

Livingston was advised in his notice of termination in 1973 that he would receive until May 1, 1974, post-employment payments in the amount of his salary. Continental gratuitously delayed Livingston's termination date for seven weeks so that he might continue to receive payments and thereby become eligible for a vesting of pension rights on May 1, 1974.

Subsequent to his discharge, Livingston objected to his termination and pursued his rights under the grievance procedure. The Grievance Board thereafter made a final decision that denied his grievance and sustained his termination. Livingston was advised of this decision by letter dated January 28, 1974.

On March 18, 1974, Livingston's attorney wrote a letter to the President of Continental and alleged a wrongful discharge and asserted his intention to file suit if the controversy could not be settled. The letter was offensive in tone, and Continental removed Livingston from the payroll effective March 20, 1974, before his pension rights had vested.

On June 17, 1974, Livingston requested a refund of retirement plan contributions. Livingston received and accepted payment of $9,745.66 on June 25, 1974, representing his total employee contributions to his Retirement Income Plan and earnings thereon.

Livingston initially sued Continental on August 12, 1975, in the United States District Court for the Western District of Missouri. Livingston there asserted tort claims for retaliatory advancement of his pay termination date, for blacklisting, and for interference with advantageous relations. Livingston asserted a contract claim for breach of an alleged agreement with Continental to retain him on the payroll until May 1, 1974, and a Missouri state law claim for noncompliance with the Missouri service letter statute.

All issues except the service letter claim were submitted to the District Court in Missouri on stipulated facts. Livingston thereafter sought and obtained leave to dismiss without prejudice, so that he might present the retaliatory termination issue in a forum which might be more favorable.

Livingston filed the present action in the Central District of California on March 20, 1978, basing jurisdiction solely on the diversity statute. He eliminated his claims for blacklisting and noncompliance with the Missouri service letter statute. He added contentions that he had an "agency coupled with an interest" and a contract right "under Continental's policy" to post-termination pay to the pension vesting date of May 1, 1974. On his contract claims, Livingston sought the present value of his future right to pension benefits, had it vested in 1974. Present valuation of that right would have been $12,586.99 or $13,811.84, depending upon valuation assumptions made.

Respondents obtained summary judgment on the basis of the certified court papers from the Missouri litigation, including the stipulation filed by the parties therein. The Judge for the Central District of California held that all tort claims were barred by the one year statute of limitations, that Livingston did not have an agency coupled with

an interest, and that Livingston's acceptance of his employee contributions to the retirement plan foreclosed his claims for lost pension benefits resulting from any alleged breach of contract. The trial court ruled that Livingston had "elected to request and receive a refund" and thereby "entered into an accord, under California Civil Code Section 1521, or . . . made a binding election of remedies."

Livingston appealed to the Court of Appeals for the Ninth Circuit, which affirmed the trial court judgment. The Court ruled under California law that Livingston's withdrawal and acceptance of his employee contributions to the retirement fund barred any action for breach of contract rights to pension benefits. The Court did not reach the accord and satisfaction issue.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Neither the Decision Below nor the Record Raises the Federal Question Presented or Suggested in the Petition.

The sole Question Presented in the petition is whether the Ninth Circuit decision, which overruled petitioner's breach of contract claim, has decided "in effect" an important federal question with "substantial impact" on federal statutory and common law pension rights. Petitioner also claims, without explanation, that Continental has deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Petition at 3.

The Ninth Circuit below, however, did not decide or address any federal issues, nor were such issues raised in either court below by either party. This case was brought solely on the basis of diversity jurisdiction.

Petitioner does not allege that the Ninth Circuit expressly decided any federal issue. It is clear from the record, and from the unreported decisions in the appendix to the petition, that the Ninth Circuit did not. Petitioner merely presents to this Court the issue of "whether" the Ninth Circuit's decision has affected federal statutory rights, otherwise available, that petitioner did not assert. This does not entitle petitioner to raise any such issues for the first time on appeal.

Petitioner alleges no facts from the record that would cause the termination of an employee's severance payments by Continental, a private employer, to be the state or governmental action necessary for a claim under the Fourteenth or Fifth Amendments to the United States Constitution. Nor could petitioner raise any such constitutional issues for the first time in this Court, even if they were supported in the record.

Petitioner admits that the "gist of [his] lawsuit is his contention that Continental's termination of his severance pay constituted a breach of contract." Petition at 5. Petitioner raised only contract and tort claims in the trial court and made no reference to any federal statute or constitutional provision. The trial court held the tort claims barred by the appropriate California statute of limitations, and the contract claims barred both by an accord and satisfaction under California Civil Code Section 1521, and by petitioner's election of remedies.

Petitioner pursued the same contract and tort claims on appeal before the Ninth Circuit. In his statement of issues, petitioner there presented four specific questions for review. Three of these specifically related to his contract and "agency" claims, and one challenged the application of the California limitations period as a bar to his tort claims. Petitioner again did not allege any federal statutory or constitutional claim, nor did he cite any fed-

eral provision or evidence in the record to support any such claim.

Federal statutory rights were neither litigated nor even mentioned at any stage in this proceeding. The Ninth Circuit clearly did not decide any such issue. If the decision "in effect" has an impact on petitioner's federal statutory or common law rights, it does so only by precluding their later assertion because of petitioner's failure to raise them in this action.

This was a simple case in contract and tort regarding the discontinuation of severance payments because of the conduct of an employee. The parties litigated these claims in two federal district courts and one court of appeals. This case does not satisfy the standards of Supreme Court Rule 17, and does not warrant review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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